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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 145

LOUISE A. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 146

LYDIA L. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 147

LOUISE A. F. E. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 148

LYDIA L. I. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 149

LYDIA LOUISE IDA WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 150

LOUISE A. F. E. WHITCOMB, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–24) is reported in 22 B.T.A. 118. The opinion of the Court of Appeals (R. 69) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1933 (R. 69–70). The petition for writs of certiorari was filed June 9, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question is the same as that presented in the accompanying cases numbered 139–144, except that the petitioners hold interests in remainder as well as life interests under the testamentary trust created by A. C. Whitcomb, deceased. They are the daughters of the testator's deceased son Adolph.

STATUTES INVOLVED

The applicable statutes are those set forth in the Brief in Opposition in the accompanying cases numbered 129, 130, and 131, this term. Certain additional statutory provisions become relevant by reason of the argument predicated upon the fact that the beneficiaries here are remaindermen as well as life beneficiaries. These statutes are set forth in the Appendix, *infra*, p. 8.

STATEMENT

The facts are stated in the Brief in Opposition filed concurrently herewith in the accompanying cases numbered 129, 130, and 131, to which this Court is respectfully referred. There is this difference, that the petitioners here were the owners of remainder as well as life interests under the testamentary trust created by A. C. Whitcomb.

ARGUMENT

The reasoning and authorities advanced in opposition to certiorari in the accompanying cases of *John Freuler, Administrator of the Estate of Louise P. V. Whitcomb* v. *Commissioner,* Nos. 129, 130, 131, this term, are equally applicable here and reference thereto is respectfully made.

The court below made no distinction in its disposition of the cases based upon the fact that some of the taxpayers held life interests only and others, here involved, were not only life beneficiaries but owned interests in remainder. The petitioners, however, urge this distinction as an additional ground for the issuance of the writs.

The petitioners here were the daughters of Adolph Whitcomb, the testator's son, who died in 1914, and Marguerite T. Whitcomb, one of the petitioners in the allied cases numbered 139–144. As such they were entitled to, and in fact received, recurring distributions of trust income before and during the taxable years. The amounts of these

distributions were not affected by the fact that the petitioners held remainder interests—they were distributions of income *qua* income. The trustee was empowered to distribute nothing but income during the life of the trust.

The fact that these beneficiaries held remainder interests would seem not to entitle them to take a deduction from the income they received on account of depreciation. *Merchants' L. & T. Co.* v. *Smietanka,* 255 U.S. 509; *Anderson* v. *Wilson,* 289 U.S. 20. In the *Anderson case* residuary legatees received a partial distribution of the proceeds of property sold by the trust at a loss. They claimed the deduction of a loss. The District Court allowed to each beneficiary his entire share of the loss (51 F. (2d) 268 (S.D.N.Y.)). The Circuit Court of Appeals permitted the deduction to the extent that there was a distribution of the proceeds of the building (60 F. (2d) 52 (C.C.A. 2d)). Had there been no present distribution of corpus, the Circuit Court of Appeals would have allowed no deduction. This Court, in effect reversing both courts below, held that the trust alone had suffered the loss and no deduction was allowable to the beneficiaries. The Court approved the doctrine of *Baltzell* v. *Mitchell,* 3 F. (2d) 428 (C.C.A. 1st), certiorari denied, 268 U.S. 690, *Whitcomb* v. *Blair,* 25 F. (2d) 528 (App.D.C.), and allied cases upon which we rely in the other cases presented with these.

Trusts are taxable as separate entities under all the Revenue Acts here involved. Individuals are permitted a reasonable allowance for depreciation "of property used in the trade or business."[1] Where the property is held in trust, this deduction is to be taken by the fiduciary.[2] There is no provision in the statute which permits an apportionment as between the fiduciary and beneficiary in the case of depreciation. The significance of this omission is emphasized by the fact that Congress has specifically provided for such an apportionment in other connections, as, for instance, in the case of lessor and lessee claiming depletion.[3] Still more significant is the provision first incorporated in Section 23 (k) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 799, which permits the apportionment of depreciation between trustees and beneficiaries. It is clear, therefore, that there is no authority in the statute for the deduction claimed.

The petitioners assert a conflict with several cited cases. To *Merle-Smith* v. *Commissioner,* 42 F. (2d) 837 (C.C.A. 2d), certiorari denied, 282 U.S. 897, and *Reynolds* v. *Cooper,* 64 F. (2d) 644 (C.C.A. 10th), relied upon in this connection (Pet. 4), petitioners might have added *Falk* v. *Commissioner,* 64 F. (2d) 171 (C.C.A. 7th). These decisions

[1] Section 214 (a) (8), Revenue Acts of 1921, 1924, and 1926.
[2] Section 219 (b), Revenue Acts of 1921, 1924, and 1926.
[3] Section 214 (a) (10), Revenue Act of 1921; Section 214 (a) (9), Revenue Acts of 1924 and 1926.

sustain the allowance of depletion to trust beneficiaries entitled to royalties, apparently without regard to whether or not they hold interests in remainder. The conclusion in these cases seems to rest upon the peculiar incidents of depletion. See *Weiss* v. *Wiener*, 279 U.S. 333. This Court has already held that depletion in the case of a mine is to be allowed to everyone whose property right and interest is diminished by extraction and disposition of the deposit. *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364. For purposes of depletion each dollar removed from the property is in effect a distribution of corpus.

The reference to an alleged conflict with the earlier decision of the Court of Appeals in *Whitcomb* v. *Blair*, *supra* (Pet. 4), and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Freuler*, 62 F. (2d) 733 (Pet. 7), pending upon petitions as Nos. 129, 130, 131, this term, does not seem to merit an extended response. Neither *Whitcomb* v. *Blair* nor *Commissioner* v. *Freuler*, *supra*, dealt with beneficiaries having remainder interests, and whatever may have been said in that connection was not necessary to the conclusion reached. Moreover, *Whitcomb* v. *Blair* was decided by the same court which decided the present cases, so that the language on which the petitioners rely, if it be in fact inconsistent, must be regarded as having been definitely repudiated.

CONCLUSION

There is no conflict of authority. For the reasons which are set forth in this brief, read in conjunction with the brief filed concurrently in Nos. 129, 130, 131, this term, the decision of the court below is believed to be correct and the petition should be denied.

Respectfully submitted.

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JULY, 1933.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 239:

> SEC. 214. (a) That in computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913; * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 269:

> SEC. 214. (a) In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence; * * *

(U.S.C., Title 26, Sec. 955.)

The language of the preceding section is carried over into Section 214 (a) (8) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 26 (U.S.C.App., Title 26, Sec. 955).

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